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IN THE

Supreme Court of the United States

Term, 1962.

No. 830

RAY GRIFFITH HOOVER and PHOENIX IRON AND STEEL COMPANY,

Petitioners,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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IN THE

SUPREME COURT OF THE UNITED STATES.

Term, 1962.

No.

RAY GRIFFITH HOOVER and PHOENIX IRON AND STEEL COMPANY,

Petitioners,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above case on January 2, 1962.

OPINIONS BELOW.

The majority and minority opinion of the Court of Common Pleas No. 1 of Philadelphia County sitting en banc are not officially reported.

The opinion of the Supreme Court of Pennsylvania is reported at 405 Pa.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was made and entered on January 2, 1962 and a copy thereof is appended to this petition in the appendix at pp. 15 to 19, inc. Petition for re-argument was refused on January 30, 1962. The jurisdiction of this court is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW.

In this action to recover damages for personal injuries brought against the Pennsylvania Railroad Company by its employee under the Federal Employer's Liability Act, U. S. C. A. Title 45, Sec. 51 et seq., the jury returned a verdict in favor of the plaintiff against the Pennsylvania Railroad which the trial court, sitting en banc, refused to disturb. The Supreme Court of Pennsylvania granted judgment in favor of the Railroad non obstante veredicto on the basis that the evidence, as a matter of law, was not sufficient to subject the Railroad to liability under the Federal Statute. The question presented is:

Whether the Supreme Court of Pennsylvania in reaching its determination that the evidence of the Railroad's negligence did not constitute a jury question applied a standard contrary to that required by the Federal Employer's Liability Act and by the applicable decision of this Court and erroneously deprived the plaintiff of his right to the jury's verdict.

STATUTE INVOKED.

U. S. C. A. Title 45, Sec. 51.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Apr. 22, 1908, C. 149 Sec. 1, 35 Stat. 65; Aug. 11, 1939, C. 685, Sec. 1, 53 Stat. 1404. U. S. C. A. Title 45, Sec. 51.

STATEMENT OF THE CASE.

The plaintiff, Ray Griffith Hoover, brought this action in trespass against the Pennsylvania Railroad, his employer, and the Phoenix Iron and Steel Company to recover damages for injuries which he sustained on January 26, 1957 when the train on which he was riding was brought to a sudden and abrupt stop (R. 137a).

The plaintiff proceeded against the Phoenix Co. on common law principles; his cause of action against the Railroad Company was based upon the Federal Employers' Liability Act, the Complaint specifically asserting liability on the part of the Railroad under the provision of that Act (R. 3a).

The plaintiff was the flagman on the Railroad's Broadway Limited, an 18 car passenger train, and he was stationed in the rear car (R. 137a). The train was proceeding toward New York City from Harrisburg, Pennsylvania, on the main eastbound track when the accident occurred.

That track proceeds Easterly from Harrisburg, passes under the Dock Street Bridge, curves in a wide arc to the left and then runs adjacent to a small railroad line on the land of Phoenix Iron and Steel Company, there being a space of about 7½ feet between the nearest rails of the respective tracks (R. 22a, 148a).

Shortly prior to the time the "Broadway Limited" was about to pass the premises of defendant Phoenix Iron & Steel, a car on the tracks of Phoenix Iron & Steel situate on its own property, was bumped in the usual manner by a shifting engine of Phoenix operated by its own crew preparatory to taking it away. The coupler pin failed to drop. As a result, this car was driven forward and struck another gondola also on the tracks of Phoenix Iron & Steel, parallel to the Railroad's right of way, causing it to tilt

toward the Pennsylvania Railroad right of way. Having observed the tilt, the conductor of the train of Phoenix Iron & Steel proceeded to the tracks of Pennsylvania Railroad Company and gave notice to the oncoming "Broadway Limited" to stop by waving a white card while standing in the middle of the Pennsylvania Railroad's tracks (R. 46a).

At the time of giving of this notice, the "Broadway Limited" was over 900 feet away and had not yet come to what is known as the "Dock Street Bridge." It was some distance beyond this bridge towards Harrisburg. The bridge itself was 815 feet from the point where the Phoenix Iron & Steel gondola tilted towards the tracks (R. 13a). The "Broadway Limited" continued on, and when it arrived at a point about 100 feet from the tilted gondola, the engineman threw the train into an emergency stop, thereby causing plaintiff's injuries (R. 86a, 93a, 94a, 137a). The locomotive and one and one-half cars passed the tilted gondola. There was no contact between the gondola and the "Broadway Limited" although the space between the projecting handrails of the cars of the "Broadway Limited" and the tilted gondola was but a few inches (R. 44a, 47a).

There was testimony to the effect that the engineer's forward view would be obscured by the front end of the engine as the train rounded the curve after passing under the bridge and that he would be unable to see the gondola until he was 225 feet west of it.

The fireman on the train so testified, as did the general foreman of the Railroad (R. 16a, 105a, 159a).

However, this testimony also established that had the fireman been at his post on the left side of the engine (R. 97a, 98a) he would have had a clear view of the gondola for a distance of at least 814 feet (R. 118a, 159a). Before the train reached the "blind spot" the fireman went to the rear of the engine to turn up the heat and he was

there when the emergency brakes were applied (R. 98a). He was familiar with the locale (R. 104a) and he testified that it was his duty to keep a lookout (R. 117a).

The general foreman of the Railroad testified that he knew the nature of the locale, that he knew that firemen normally went to the rear of the engine to turn up the heat immediately upon leaving Harrisburg and that sometimes they did not get back to their post at the left side of the engine before the blind spot was reached and that he did nothing about it (R. 162a-163a).

There was testimony that the duty of an engineer in operating a train is to keep "a constant lookout ahead to see what the conditions of the track are" (R. 102a).

The engineer of the Broadway Limited testified that he was travelling at 30 M. P. H. when he saw the gondola (R. 85a).

The general foreman of the Railroad and a qualified engineer called by Phoenix testified as to the stopping distances of the Broadway Limited travelling at 30 M. P. H. Their estimates varied from 400 to 600 feet for an emergency stop and 750 to 1,000 feet for a service or normal stop (R. 149a, 152a, 174a, 177a).

The train was actually brought to an emergency stop in about 250 feet. A car length was estimated to be 60 to 80 feet; the engineer said he stopped with the front of the train 3 car lengths passed the west end of the gondola (R. 94a); the conductor on the train said the overall stopping distance was 3 car lengths (R. 136a); the fireman said 2½ car lengths (R. 110a).

The engineer testified that it takes some time to increase the speed of a train as heavy as the Broadway Limited (R. 85a). A period of only three minutes elapsed from the time the train left the Harrisburg station until the stop (R. 133a).

The Phoenix expert, Engineer Hilbert, testified that the

proper way to stop the train, assuming that it was going at 30 M. P. H. and that the engineer was aware of the gondola at a distance of 814 feet, was to make a service application of the brakes and thereafter to apply the emergency brakes, if necessary (R. 176a). This was confirmed to some extent by the Railroad's expert (R. 153a).

The case was tried before the Honorable *Edward J. Griffith* and a jury in the Court of Common Pleas No. 1 of Philadelphia County on October 19-21, 1960. The plaintiff's points for charge requested the Court to charge the jury with respect to the Railroad's duty to the plaintiff under the Federal Employer's Liability Act and the Court so charges, stating in part:

> "In other words, if you find that under the evidence the Pennsylvania Railroad could have brought its train to a stop in a manner that would not have caused injury to Mr. Hoover and failed to bring its train to such a stop, then, although Phoenix is negligent, and that is admitted, as I have said, it is the negligence of the Pennsylvania Railroad and not the negligence of Phoenix that caused the injury to Mr. Hoover. I hope you understand that.
>
> Now let us consider the various responsibilities of these two defendants in this case. The Pennsylvania Railroad, as the employer of Ray Griffith Hoover, was under an absolute duty to provide a reasonably safe place for him to work. This means a place to work where he can be free of unnecessary and unreasonable risks of harm.
>
> The failure to provide a reasonably safe place for an employee to work, under all the circumstances is negligence. Of course, the safe place is travelling in this train free from being tossed and jostled about.
>
> If you find that the defendant, the Pennsylvania

Railroad Company, failed to provide a reasonably safe place to work and that by reason thereof, in whole or in part, Ray Griffith Hoover suffered injuries, your verdict should be for the plaintiff against the defendant, the Pennsylvania Railroad Company" (R. 203a-204a).

"I also want to charge you if you find, from all of the evidence, that the Pennsylvania Railroad, in the exercise of reasonable care, could not have become aware of the possible hazard of the tilted gondola until the train was so close to it that there was no reasonable choice except to make an emergency application of the brakes, then your verdict should be in favor of the Pennsylvania Railroad" (R. 233a).

The jury returned a verdict in favor of plaintiff against both defendants. The parties had stipulated the damages to be $50,000.00. The Railroad thereafter filed its motion for judgment n. o. v. upon the whole record.

In their briefs and argument on this motion counsel argued the evidence in light of the Railroad's liability under the F. E. L. A. The three judge court dismissed the motion by a two to one decision, both the majority and minority opinions taking cognizance of the applicability of the F. E. L. A.

MAJORITY OPINION.

"With Bitner's view ahead thus obstructed by reason of the curve, Snyder's view, as fireman, on the other side of the cabin, would not have been so obstructed. In fact Snyder's view from the bridge would have been far beyond the tilted car. Snyder, however, was not at his post. He was tending to other chores. He first saw the obstruction when his engine was three car lengths from it.

Under these circumstances did P. R. R. violate any duty it owed its employee, Hoover? The test used is that applied under The Federal Employers' Liability Act, which test has been set forth in many cases in our Federal Courts.

Mr. Justice Brennan in *Rogers v. Missouri Pacific R. R. Co.*, 352 U. S. 500, 506, set forth the applicable law as follows:

> 'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or *in part*" to its negligence.'

Under the test above set forth, whether the 'employer's negligence played any part, even the slightest', we believe there is a degree of culpability, based on the testimony and the verdict, on the part of the P. R. R. from which it cannot escape" (R. 255a-256a).

DISSENTING OPINION.

"The duty of the Railroad under the F. E. L. A. was to provide the plaintiff, its employee, with a reasonably safe place to work. The argument of Phoenix is that two recent decisions of the United States Supreme Court, Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, and Webb v. Illinois Central Railroad Co., 352 U. S. 512, have stated the test of the Railroad's liability to be that the case is for the jury if there is any negligence, even the slightest, on the part of the Railroad. As we read these cases, the language 'even the slightest' had to do with causation, not liability, and that the test as to negligence is the 'reasonable man' test normally applied. In any event, as we view the case, there is no evidence, not even the slightest, that any negligence on the part of the Railroad played a part in causing plaintiff's injuries.

For the foregoing reasons we hold that the motion of the Railroad for judgment n. o. v. should have been granted.

Peter F. Hagan,
P. J."

The Pennsylvania Railroad appealed to the Supreme Court of Pennsylvania from the action of the lower Court denying its Motion for Judgment n. o. v. The counter statement of the question involved filed by Phoenix reads as follows:

"Was the evidence sufficient to support the jury's finding that defendant, Pennsylvania Railroad, breached the duty which it owed to plaintiff, its employee, by virtue of the Federal Employers Liability Act."

The Supreme Court of Pennsylvania reversed the Trial Court, set aside the jury's verdict for plaintiff and entered judgment non obstante veredicto in favor of the Railroad. The court did not discuss the Federal Employers' Liability Act nor did it cite any opinion of the Court.

REASONS FOR GRANTING WRIT.

The Supreme Court of Pennsylvania has rendered an opinion in this action which conflicts with and, in effect, nullifies the decisions of the Supreme Court of the United States interpreting the Federal Employers' Liability Act, particularly as regards the sufficiency of evidence to raise a jury question, and which has erroneously deprived the plaintiff of the jury's determination of his case.

Certiorari should be granted in order to ensure compliance by the courts of the Commonwealth of Pennsylvania and of the several states with the decisions of this Court, thereby achieving a uniformity among the states in administration of the Federal Employers' Liability Act and thus preserving to plaintiff and to all affected workers the right conferred on them by the Federal Statute.

The plaintiff proceeded on the theory that had the Railroad kept a proper lookout it would have observed the alleged obstruction on its tracks in sufficient time to bring the train to a service stop or in any event to reduce the train's speed and warn plaintiff of an imminent stop by a service application of the brakes before switching to emergency; therefore, that the failure of the Railroad to keep a proper lookout constituted negligence which was a legal cause of plaintiff's injuries.

The testimony of the engineer, the fireman and the general foreman amply support the finding that the Railroad

did not keep a proper lookout and the opinion of the Pennsylvania Court assumes that it did not.

The reasoning of the Court was that even if the engineer had been aware of the gondola at a distance of 814 feet he would have been justified in making an emergency application of the brakes at that distance and therefore the failure of the Railroad to keep a proper lookout was not a legal cause of the accident.

This reasoning of the Court is premised on postulates of fact and opinion which the jury, by virtue of its verdict, probably rejected. The Court found that the train was traveling at 30 M. P. H. when it reached the Dock Street Bridge; that a service stop would require at least 750 feet and, therefore, the engineer would have been negligent had he attempted a service stop with a margin of safety of only 64 feet.

The engineer testified that his speed was 30 M. P. H.; expert opinion as to the stopping distance of the Broadway Limited at that speed varied from 400 feet to 600 feet for an emergency stop and 750 feet to 1,000 feet for a service stop.

However, the train actually was brought to an emergency stop in about 250 feet. This salient fact was treated by the Pennsylvania Court as having no significance. On the basis of this evidence the jury may have found with reason either that the estimates of the experts were excessive or that the speed of the train was less than 30 M. P. H. and in either event that the train could have been brought to a service stop in less than 400 feet. Therefore, that the failure of the Pennsylvania Railroad to keep a proper lookout with the resultant necessity for an emergency stop was negligence and the legal cause of plaintiff's injuries.

In the alternative, the jury may have found on the basis of the facts and opinions assumed by the Supreme Court of Pennsylvania in its opinion that the engineer should have made a service application of the brakes to reduce the train's

speed and warn plaintiff of an imminent stop before resorting to an emergency application of the brakes if that became necessary; as a further alternative, the jury may have found that the speed of the train, considering the presence of the blind spot and the absence of the fireman, was excessive.

In any event, it may be stated with reason that fair-minded men on the basis of the evidence produced could have found for the plaintiff as did the jury.

It is respectfully submitted that the Supreme Court of Pennsylvania in setting aside the jury's verdict has usurped the function of the jury, has deprived plaintiff of rights conferred upon him by the federal statute, and has rendered a decision which conflicts with the decision of this Court in *Schulty v. Pennsylvania Railroad Company*, 350 U. S. 523, 76 S. Ct. 608, 100 L. ed. 668; *Rogers v. Missouri Pacific Railroad*, 352 U. S. 500, 77 S. Ct. 443, 1 L. ed. 2nd 493; *Webb v. Illinois Central Railroad Company*, 352 U. S. 515, 77 S. Ct. 451, 1 L. ed. 2nd 503; *Harris v. Pennsylvania Railroad Company*, 361 U. S. 15, 80 S. Ct. 22, 4 L. ed. 2nd 1; *Inman v. Baltimore & Ohio Railroad Company*, 361 U. S. 138, 80 S. Ct. 242, 4 L. ed. 2nd 198; and *Davis v. Virginian Railway Company*, 361 U. S. 354, 80 S. Ct. 387, 4 L. ed. 2nd 366.

That the issues raised herein are of such nature as to warrant the grant of certiorari has been considered and reaffirmed by the Court on several occasions, see the opinion of Mr. Justice Douglas in the *Harris* case, supra and *Rogers v. Missouri*, supra, at p. 501.

WHEREFORE, Petitioners pray the Court that this Petition for a Writ of Certiorari be granted.

MICHAEL A. FOLEY,
B. NATHANIEL RICHTER,
Counsel for Petitioners.

APPENDIX.

[315]

IN THE

SUPREME COURT OF PENNSYLVANIA.

EASTERN DISTRICT.

RAY GRIFFITH HOOVER vs. THE PENNSYLVANIA RAILROAD COMPANY, Appellant, and PHOENIX IRON AND STEEL COMPANY.	No. 387, January Term, 1961. Appeal from the Judgment of the Court of Common Pleas No. 5 (Tried in Court of Common Pleas No. 1) of Philadelphia County at No. 1211, September Term, 1957.

OPINION OF THE COURT.

MUSMANNO, J. Filed: January 2, 1962.

The Phoenix Iron and Steel Company maintains a plant about one mile east of Harrisburg where it operates a small railroad whose tracks parallel the right of way of the Pennsylvania Railroad. On January 26, 1957, employees of the Phoenix Company, under the direction of the freight conductor Frank J. Pilsitz, were shifting freight cars on the Phoenix tracks. A string of cars was being propelled for-

ward by a diesel docomotive against a lone car for the purpose of attaching that car to the string. The joining coupler which was to effect the connection, failed to work and the lone car took off by itself as a result of the tremendous jolt it received in the unsuccessful fastening process. Since the brakes on this car had not been applied, it achieved a forceful momentum and, after traveling some 80 feet, rammed head-on into a lone gondola standing on the track, striking it with such violence that the gondola tilted from the perpendicular, its superstructure listing to such a degree that the upper part of the car filled almost completely the space between the Phoenix track and the Pennsylvania Railroad track, this space measuring 7 feet 3½ inches.

[315-2] While all this was taking place, the famed Broadway Limited of the Pennsylvania Railroad was moving eastwardly from Harrisburg on its appointed run to New York, traversing the track next to the track harboring the leaning gondola. A gondola is a freight car without roof and with steel sides, having no resemblance whatsoever in shape, size or weight to its gossamer-weight namesake riding the canals of Venice.

The Phoenix freight conductor, Pilsitz, saw at once that the overhang of the gondola jeopardized the passage of the Broadway Limited. The thunder and the flash of this train already could be felt and Pilsitz whipped from his pocket a white card which he waved, as he stood in the track over which the Broadway Limited, with its eighteen passenger cars, was advancing. The train had now reached a point known as Dock's Bridge, 814 feet east of the steel-ballasted marooned freight car.

In the locomotive of the Broadway Limited, the engineer saw the obstruction and threw on his emergency brakes, bringing the train to a stop with its front end some 140 to 210 feet beyond the reclining gondola and missing the sides of the derelict car by a scant inch and a half.

Although a crash was providentially averted, the incident was not without casualty. The passenger brakeman, Ray Griffith, who was riding in the last car of the Pennsylvania train, suddenly found himself, as the air brakes seized hold of the revolved wheels, picked up as if by a giant hand and hurled through the glass in the door of the observation car, sustaining serious injuries.

He brought suit against the Phoenix Iron and Steel Company charging it with common law negligence and against the Pennsylvania Railroad Company on a charge of liability under the Federal Employers' Liability Act. At the trial, all parties agreed that [315-3] the plaintiff's injuries entitled him to a verdict of $50,000 and that Phoenix was negligent in the manner it allowed one of its cars to get away, strike and cripple the crucial gondola and thus produce a serious hazard on the main track of the Pennsylvania Railroad. The only pertinent question submitted to the jury was whether the railroad company was also negligent in company with Phoenix.

The jury found that it was. The verdict was affirmed by the court en banc and the railroad company appealed.

The railroad company contends that Phoenix was solely responsible for the accident, pointing out that although the top of the tilted gondola missed the locomotive of the Broadway Limited by only an inch and a half, no part of the car actually physically touched the rails of the Pennsylvania track and, as a consequence of this near miss, the electronic signal system was not activated. The Pennsylvania engineer thus had no way of knowing what lay ahead except by ocular observation, but as soon as he beheld the danger he endeavored with all mechanical means at his disposal to stop the train immediately, that is, he applied the emergency safety system.

But Phoenix argues that, granting the necessity for stopping the train, there was no need to apply the emergency

brakes with the precipitate stoppage which catapulted Hoover through the glass partition in the rear car. Specifically, Phoenix contends that the Broadway Limited should have made a service stop instead of an emergency stop.

A witness for Phoenix testified that a regular service stop, with a train moving at 30 miles per hour, could be effected in 750 feet. A railroad witness, however, testified that a regular service stop required about 1000 feet whereas an emergency stop could be effected in 600 feet.

[315-4] According to the argument of Phoenix, the engineer could have stopped his train within 64 feet of the obstruction if he had made a service stop at the appropriate time and place. There were physical characteristics in the topography at this point which made it impossible for the engineer to see the whole of the intervening distance of 814 feet. But, aside from this, the argument of Phoenix presupposes that the engineer could *instantaneously* measure the distance from Dock's Bridge to the gondola, that he knew the exact weight of every car in his train since weight has a bearing on speed and stoppage, that he knew the amount of wind pressure, the condition of the rails and all the other factors which go into determining whether to attempt a regular service stop or an emergency stop. To presuppose all this is to imagine that beneath the railroad cap and within the engineer's denims there rode a combined Einstein, expert surveyor and meteorologist. But even if the engineer had been this kind of a prodigy, would he still have been justified in using the service stop which would have brought him within 64 feet of disaster? Was it not his duty, charged as he was with the responsibility for the lives of the passengers in 18 cars, to effect a stop at the earliest possible moment?

The accident happened on January 26, 1957. The trial occurred in October, 1960. The attorneys and witnesses had three years and nine months within which to figure out the

exact distances, speeds, and so on. Yet they would impose upon the engineer the responsibility of working out all these complex and intricate problems in the matter of two or three lightning seconds, while at the same time saying a prayer because the engineer believed that he would not clear the obstruction and that the steel car would strike the motor where he was sitting and crush in on his side, even possibly tilting the locomotive.

[315-5] It appears that the fireman on the passenger train was attending to duties in the rear of the locomotive at the time the train was passing under Dock's Bridge. From this fact Phoenix argues that if the fireman had been at his window he would have seen the gondola when the train was 814 feet away or at some point closer than the point where the engineer saw it the first time. But even if the fireman had seen it at the time indicated and had communicated his observation to the engineer while the train traveled 64 feet, the duty still devolved upon the engineer to apply the emergency brakes.

It is clear that the cause of Hoover's injuries was exclusively the negligence of Phoenix and that, therefore, the judgment against the Pennsylvania Railroad must be reversed.

It is accordingly reversed, and judgment n.o.v. entered in favor of the Pennsylvania Railroad Company.

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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April 30, 1962.

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OPINIONS BELOW.

The opinions of the Court of Common Pleas No. 1 of Philadelphia County are not officially reported but they appear in full in the Record in the Court below at pages 253a to 266a.

The opinion of the Supreme Court of Pennsylvania is reported at 405 Pa. 642 (1962).

JURISDICTION.

In the trial court, a Court of Common Pleas of Philadelphia County, the plaintiff, Ray Griffith Hoover, was awarded a verdict of $50,000 against both defendants, the Phoenix Iron and Steel Company and The Pennsylvania Railroad Company. The Railroad appealed to The Pennsylvania Supreme Court. Phoenix did not appeal from the judgment entered in favor of Hoover and against it but did oppose the Railroad's appeal. Hoover filed no brief and made no oral argument in the Pennsylvania Supreme Court.

On January 2, 1962, the Supreme Court of Pennsylvania sustained the Railroad's appeal and entered judgment in its favor. Hoover's judgment against Phoenix was not disturbed. Thereafter Phoenix filed a motion for reargument and on January 30, 1962 the Pennsylvania Supreme Court denied that motion.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether either

(a) a defendant (Phoenix) whose rights and obligations are unrelated to the Federal Employers' Liability Act and who is not a party to the judgment entered in the court below, or

(b) a plaintiff (Hoover) who did not oppose the Railroad's contentions relating to the Federal Employers' Liability Act in the Pennsylvania Supreme Court and who has recovered his damages in a judgment against another defendant (Phoenix);

has legal standing to petition this Court for certiorari.

2. Whether a decision by the Pennsylvania Supreme Court that

(a) the evidence supported a finding that the sole cause of an accident was the admitted negligence of one defendant (Phoenix) in obstructing a railroad track, and

(b) the evidence did not support a finding that the other defendant (Railroad) was negligent in bringing its train to an emergency stop to avoid the obstruction,

merits review by this Court where the decision turns solely upon an analysis of unique facts, is consistent with all relevant case law and involves nothing more than a question of whether one defendant whose rights and obligations are controlled by the common law, can obtain contribution from the other.

STATUTE INVOLVED.

The statute claimed to be involved is the Federal Employers' Liability Act, 35 Stat. 65, as amended by 53 Stat. 1404, 45 U. S. C. §51, *et seq.*, the text of which is set forth in Petitioner's petition at page 4.

STATEMENT OF THE CASE.

On January 26, 1957 at about 8:15 A. M., Hoover was the flagman in the last car of the Railroad's eighteen-car passenger train known as "The Broadway Limited". He was thrown and injured when the train was brought to an emergency stop in a successful effort to avoid a collision with a gondola car of Phoenix, which has a plant, with extensive railroad siding tracks, about a mile east of Harrisburg, Pennsylvania. The gondola, although still on Phoenix's own tracks adjacent to the Railroad's main line track, had been tilted toward the Railroad's tracks by the admitted negligence of a Phoenix crew just as the eastbound Broadway Limited was approaching. Hoover instituted suit against Phoenix for its negligence, under the common law, and against the Railroad, under the Federal Employers' Liability Act, 35 Stat. 65, as amended by 53 Stat. 1404, 45 U. S. C. §51 *et seq.*

The action was tried in a Court of Common Pleas, Philadelphia County, where it was stipulated that plaintiff was entitled to $50,000 damages. On the issue of liability the jury returned verdicts against both defendants. The Railroad filed motions for judgment n. o. v. and for a new trial and these motions were denied by the Trial Judge, Edward

J. Griffiths. A dissenting opinion was written by President Judge Peter F. Hagan. Judgment was thereafter entered against the Railroad, which appealed to the Pennsylvania Supreme Court. Phoenix filed no post-trial motions in the trial court, took no appeal to the appellate court and Hoover's judgment against it became final and unappealable. After being presented with briefs and oral arguments on behalf of Phoenix and the Railroad (Hoover not participating), the Pennsylvania Supreme Court, in a unanimous opinion written by Justice Michael A. Musmanno, entered judgment in favor of the Railroad notwithstanding the verdict on January 2, 1962. The opinion analyzed the evidence and found that it did support a finding that the sole cause of the accident was Phoenix's negligence and that it did not support a finding of any Railroad negligence. Phoenix's motion for reargument was denied on January 30, 1962.

All the factual witnesses at trial were called by Hoover. Phoenix and the Railroad each called one expert witness to testify, hypothetically, on stopping distances.

Phoenix's negligence was established by its own conductor. He testified that his crew backed a draft of 10 or 12 cars to couple to a standing car (39a-41a). When the draft of moving cars struck the standing car they did not couple as they should have (40a-41a). The standing car was set in motion, and thereafter struck another Phoenix gondola which the same crew had parked earlier, without applying its brake (42a-43a). Although that parked gondola was loaded with steel plates (70a-71a), it was hit hard enough to tilt it away from the Phoenix plant and toward the Railroad's main line track (41a-45a). Phoenix's conductor immediately went around the tilted gondola and saw that it was a hazard to the Broadway Limited which he testified was approaching at a speed of 30 to 40 miles per hour (50a, 74a-76a). There was no time to call the Rail-

road on the nearby telephone (48a) so he ran down the tracks for 3 to 5 seconds waving his conductor's card at the oncoming train (46a, 74a). The Broadway Limited came to a stop with the engine and two cars past the side of the tilted Phoenix gondola (47a). The distance between the sides of the stopped cars of the Broadway Limited and the tilted gondola was about an inch or an inch and one-half (26a, 89a, P-4 (244a), P-6 (245a)).[1] After the presentation of all the evidence, Phoenix admitted its negligence (201a-202a).

The Railroad crew[2] testified that the Broadway Limited was picking up speed (32a, 85a, 102a-103a) and had reached 30 to 35 miles per hour (32a, 85a) as it moved east on tracks which curved to the north (or left as the train moved east) and passed under the Dock Street Bridge.[3] This Bridge was later shown by measurements to be 810 feet (168a) or 814 feet (13a) from the western end of the tilted gondola.

With the train rounding the curve the engineman could not have seen the tilted gondola until approximately 240 feet from it (105a-106a).[4] When he saw the obstruction he applied the emergency brake and came to a stop in about 600 feet (86a, 87a, 92a, 93a, 94a). The front of the train

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[1] Hoover's photographs P-4 (244a) and P-6 (245a) show the tilted gondola and the Broadway Limited in place after the accident.

[2] Hoover had taken the discovery deposition of Engineman Bittner twenty-two months before the trial and read it into evidence. Bittner was temporarily hospitalized at the time of the trial and the Railroad requested a continuance. This motion was refused. The refusal of the Railroad's motion for a new trial because of the denial of its motion for a continuance was not passed upon by the Pennsylvania Supreme Court since it entered judgment n. o. v.

[3] The scene of the accident is well portrayed by a survey, P-1 (241a), and photographs marked P-2 (242a) and P-3 (243a).

[4] The curve straightens out about 225 feet from where the gondola was tilted (16a).

was then stopped with its engine and two cars east of the west end of the tilted gondola.[3]

The application of the emergency brakes prevented contact between the Broadway Limited and the Phoenix gondola by substituting a back-and-forth action on the cars of the train for their normal lateral swaying (89a, 104a).

The fireman, having checked the six separate signals which assured him that the track ahead was clear (97a-98a),[4] had gone to the rear of the engine to increase the flame in the boiler, the flame having been previously lowered by him to decrease the danger of fires while the Broadway Limited was in the Harrisburg Station (98a). In addition to the fact that the Phoenix conductor said the train was coming under the Bridge when the gondola was tilted toward the Railroad's tracks (50a), the fireman testified that even if he had been in the cab of the engine he would not have been able to see the Phoenix gondola until the train was at the Dock Street Bridge (117a-118a).

The only witness called by the Railroad, a road foreman, testified hypothetically that if the train were going 30 miles per hour it would take about 600 feet to make an emergency stop and about 1,000 feet to make a service stop (152a, 149a).

An engineman testified hypothetically on behalf of Phoenix that if the train were going 30 miles per hour it would take about 400 to 500 feet to make an emergency stop (177a) and about 750 feet to make a service stop (174a).

In summary, the three witnesses who estimated the speed

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[3] The engine and two cars of the train plus the tilted gondola at 80 feet each (87a, 33a, 105a) would be about 220 feet.

[4] Since the tilted Phoenix gondola did not touch the Railroad's tracks, it did not activate the system of electronic signals which would have warned the oncoming train of an obstruction on the tracks (129a-130a, 165a).

of the train agreed upon a minimum of 30 miles per hour and a maximum of 40 miles per hour.[7] The two witnesses who testified to the minimum distance required for a service stop were asked only to use 30 miles per hour as the basis for their opinions. One estimate was 1,000 feet and the other was 750 feet, with a recognition that a greater distance would be required if the train were accelerating (181a-182a). The three witnesses who testified on that subject agreed that the train was, in fact, picking up speed. On the evidence, therefore, the shortest distance within which the train might possibly have stopped by use of the service brake was something more than 750 feet and the earliest the obstruction might conceivably have been seen by anyone on the engine was when it was 810 to 814 feet away. Combining this accurately obtained measurement with the minimum estimates of speeds and stopping distances and ignoring the facts that Hoover himself proved: (a) that the engineman could not see the obstruction until the train was 240 feet from it and (b) that the fireman was properly performing his duties in the rear of the engine, Phoenix contended, in the trial court and in the court below, that the factfinders should be permitted to find the train operators liable for failing to take a chance on a service stop which might or might not have stopped the train something less than 64 feet short of the tilted gondola. The contention that the Railroad was negligent in making an emergency application of the brakes, and should have made a service application of the brakes, ignored the fact that even with the emergency application of the brakes that was made the train had been unable to come to a stop before the engine reached the tilted gondola. It also assumed that the first move toward a service application of the brakes should and could have been made as soon as the engine passed the

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[7] The speed limit was 75 miles per hour (84a)

Dock Street Bridge; however, even if the fireman had been in the front of the engine and had seen the danger of the Phoenix gondola when the train was at the Dock Street Bridge he could only have called a warning to the engineman and an emergency stop was still a necessity. The Supreme Court of Pennsylvania unanimously agreed that, on the evidence, Phoenix could not impose any part of its responsibility for Hoover's damages on the Railroad.

STATEMENT OF RESPONDENT'S POSITION.

The petition for writ of certiorari should be denied for the following reasons:

Phoenix Iron and Steel Company has no legal standing to seek a review of the order of the court below. Phoenix seeks a review of a question which it claims arises under the Federal Employers' Liability Act. But Phoenix is not a railroad employee and its obligations in the present case arise under the common law of Pennsylvania and are in no way controlled by any federal statute.

Hoover has no standing to seek a review of the order of the court below. Hoover obtained a final judgment against Phoenix, a solvent corporation, which either has been or can be collected at his will. Any issue between Hoover and the Railroad is completely moot as was evidenced by Hoover's *lack of participation in the proceedings in the* Pennsylvania Supreme Court.

The question presented does not merit review. The decision below was fully justified and was based solely upon an analysis of the unique facts of the accident. The decision does not involve any new application of the Federal Employers' Liability Act but is, rather, consistent with all decisions of this Court which have interpreted that Act.

ARGUMENT.

I. Petitioners have no legal standing to petition for a Writ of Certiorari.

In the present case Phoenix purports to complain about the application of the evidence to the Federal Employers' Liability Act. The rights and obligations of Phoenix in the present case are, however, controlled by the common law of Pennsylvania. Phoenix cannot challenge the application of the statute as between Hoover and the Railroad: *Tileston v. Ullman*, 318 U. S. 44 (1943); *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-operative Marketing Association*, 276 U. S. 71 (1928); *Heald v. District of Columbia*, 259 U. S. 114 (1922). Phoenix has no standing in this Court in this case and its efforts to make its common law rights and duties appear to involve the Federal Employers' Liability Act are without a sound foundation.

On the other hand, Hoover has obtained a final judgment against Phoenix which has been or can be collected at his will. He presented no brief or oral argument to the Pennsylvania Supreme Court and, so far as he is concerned, the present case is, and has been for some time, entirely moot.* Hoover has no standing to request a review by this Court since, in order to be heard in this Court, the

* Before instituting the present case in the state court against both Phoenix and the Railroad, Hoover had started suit against the Railroad alone, on the same cause of action, in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 23188. The Railroad, there, joined Phoenix as a third party defendant. Since obtaining his recovery against Phoenix in the present state court suit, Hoover permitted his federal court action to be dismissed for want of prosecution as of February 9, 1962.

question must have been raised in the state court by the party who seeks to have it reviewed: *Sully v. American Nat'l Bank*, 178 U. S. 289, 297 (1900); see also *Puget Sound Power & Light Co. v. County of King*, 264 U. S. 22, 25 (1924). Hoover made no argument whatsoever when the case was before the Pennsylvania Supreme Court and he has, therefore, no standing to complain of its decision and no more than an academic interest in any opinion this Court might render in this case.

II. The Pennsylvania Supreme Court correctly analyzed the evidence relating to this unusual accident. There is no conflict of decisions and no important question of federal law.

All of the evidence shows that the Phoenix crew tilted the Phoenix gondola loaded with steel plates toward the Railroad's tracks (66a-71a), that the Broadway Limited was at that very moment approaching (48a, 75a-76a), that the train was brought to an emergency stop to avoid the catastrophe which would have resulted from a collision (70a, 87a, 104a, 215a), and that the normal swaying of the Broadway Limited would have resulted in contact between the train and the gondola had the engineman not taken the action he did (103a-104a, 155a).

The admitted negligence of Phoenix thus created an emergency situation which could have resulted in the wreck of the Broadway Limited and severe injuries to its passengers and crew. Only the action of the Railroad engineman prevented the accident. Being forced to concede the compelling necessity that the train be stopped, Phoenix, with more than three and one-half years to review, measure and calculate, tried in the court below to impose responsibility for the accident upon the Railroad

upon two theories. First, it contended that the Railroad was liable because its engineman should have seen the danger created by the tilted Phoenix gondola at a time when he could have brought the train to a smooth service stop just short of the obstruction (210a). Secondly, it contended that the Railroad was liable because it permitted its fireman to adjust the boiler in the rear of the engine as the Broadway Limited approached the Phoenix plant because, it argued, if he had been in the front of the engine he might have seen the danger in time for the train to be brought to a smooth service stop (213a-214a).

The first contention is directly contrary to the facts proved by every witness. No one estimated that this train could have been brought to a service stop in less than 750 feet and everyone agreed that because the tracks curved to the left and the engineman was on the righthand side of the engine, with 24 feet of the engine cab in front of him and to his left (105a), the engineman could not possibly have seen the obstruction until the train was about 240 feet from it. He obviously, therefore, did not have time even for an emergency stop, let alone a service stop.[9] Moreover, this contention ignores the fact that Hoover's own witness, Engineman Bittner, testified without contradiction that it was his job to get his train stopped "as quick as possible" as soon as he saw the obstruction (91a).

The second contention was conceded by Hoover to be invalid at the trial (118a). Moreover, Hoover proved the invalidity of the theory when his evidence established,

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[9] The suggestion in the petition, at pages 13 and 14, that the engineman might have tried a service application of the brakes before resorting to an emergency application also does not fit the facts of this case. Since the train could not be stopped short of the obstruction with an emergency application of the brakes, increasing the stopping distance by first trying a service application of the brakes before throwing the train into emergency would both have increased the overall stopping distance and made the stop rougher (24a).

without contradiction, that the fireman was acting properly in attending to his duty of adjusting the boiler (98a-99a, 129a). Also, the suggestion overlooks the fact that even if the fireman had been in the front of the engine, he couldn't have seen the gondola until an emergency stop was a necessity.

Moreover, even if on some assumed set of figures and calculations it could now be made to appear that the train might possibly have come to a service stop just short of the tilted gondola,[fn] imposition of liability on the Railroad would assume that the engine crew could have accurately calculated all of the variable factors the instant the engine emerged from under the Dock Street Bridge, including the exact distance between the engine and the Phoenix gondola, the exact speed of the train and its state of acceleration, the makeup and weight of the train and the weather's effect on the tracks and wheels. Instantaneous response from all the equipment and tracks, as well as perfect human reactions and mathematical computations would also have had to be assumed. Even with three and one-half years to look back on the events and make all the necessary mathematical calculations and measurements, the most that can be said is that the gamble might barely have been won. With all the knowledge amassed carefully by Phoenix over the years, much less guessed at in a split second by the Railroad crew, such an outrageous gamble with the lives of the passengers and crew of the Broadway Limited would have been indefensible.

[fn] There is actually no testimony that this train could have been brought to a service stop in as little as 750 feet. Phoenix's expert testified that at 30 miles per hour the train could have come to a stop with a service application in "I should say 750 feet" (174a), but he agreed that a number of variable factors would change this estimate of distance (178a) and that the stopping distance would be greater if the train were accelerating (181a-182a). Hoover's uncontradicted testimony showed that the train was accelerating (32a-33a, 85a, 103a).

Since the opinion of the Pennsylvania Supreme Court on January 2, 1962, Phoenix has, in its motion for reargument there and its petition for a writ of certiorari here, suggested a new argument. Having proved in the trial court that the train was moving 30 to 40 miles per hour and couldn't possibly come to a service stop in less than 750 feet, the petitioners, at page 13 of their petition, argue that the jury should have been permitted to find that the Broadway Limited was traveling at a speed of less than 30 miles per hour and might have been brought to a service stop in less than 400 feet. In addition to the fact that arguments raised and rejected for the first time on a motion for reargument to a state supreme court do not give rise to a right to petition for certiorari (*Radio Station WOW Inc. v. Johnson*, 326 U. S. 120, 128 (1945); see also *Herndon v. Georgia*, 295 U. S. 441, 443 (1935)), the evidence simply does not support the new argument. All of the witnesses agreed that the train was moving 30 to 40 miles per hour (32a, 50a, 35a) and that fact was established by Phoenix's conductor as well as by the Railroad crew. Not one witness said the train was traveling at less than 30 miles per hour. In addition, there is not one word of testimony to suggest that this train could have been brought to a service stop in 400 feet; the minimum estimate given in the testimony for bringing this train to a service stop was 750 feet (174a). Moreover, the engineman testified repeatedly that it actually took 600 feet to bring his train to an emergency stop (86a, 87a, 92a, 93a, 94a); and since it was agreed that a service stop takes a much greater distance than an emergency stop, it is fantasy to speculate that a service stop could have been accomplished in a distance shorter than 600 feet.

The petition, at page 13, states that "the train actually was brought to an emergency stop in about 250 feet." This is not the fact. The evidence is to the contrary. The engineman said it took 600 feet to stop (86a, 87a, 92a, 93a,

94a). Working with piece-meal statistics, as suggested in the petition, produces about the same answer. The engineman said that the engine and two of the cars of his train were past the tilted gondola when the train came to a stop (94a). The other witnesses, including the Phoenix conductor (47a), agreed. Those three Railroad cars plus the Phoenix gondola, at 80 feet each (33a, 102a) total about 320 feet. Since the train was estimated to be 100 to 240 feet west of the gondola when the engineman applied the brakes, the total stopping distance was, even on this basis, within the 400 to 600 feet estimate given by the Railroad's and Phoenix's experts for the *emergency* stopping distance at 30 miles per hour. The petition is also simply wrong when it states that the fireman testified the overall stopping distance of the train to be two and one-half car lengths. The fireman testified that from the time he heard the escape of air (which was his first notice the train was in emergency) until the train came to a stop was six car lengths of eighty feet each, or 480 feet (102a).[1] Even if the petition were correct on its facts, however, the most that it suggests is that with a few weeks added to the few years following the few seconds of the emergency faced by the Railroad crew, Phoenix, with renewed and revised calculations, might be able to figure out the possible saving of a few more feet in its proposal to gamble the lives of the passen-

[1] The fireman said that after the train came to a stop the locomotive, the engine and one tender and one half cars were past the tilted gondola (110a). The petition also states that the conductor estimated an overall stopping distance of 3 car lengths. That is not correct. Trainman MacGregor was 8 or 9 car-place from the engine (134a). He heard the brakes apply in his car and saw the dust and dust around the tracks. The train moved about 3 car lengths after that (136a). To that minimum of 240 feet must be added at least the engineman's reaction time plus the distance the train moved as the brakes were applied, as the air reduction moved rearward through the draft of cars and the witness became aware of the sound and flying dust. The distance moved by the train during these events would make the total emergency stopping distance considerably in excess of 400 feet.

gers and the crew on the Broadway Limited. That would not justify a finding that the crew's conduct, in the instant of emergency, was negligent.

The petition, at page 12, refers to a purported conflict between the decision of the Pennsylvania Supreme Court and some decisions of this Court. There is no such conflict. This Court has consistently held that there must be some evidence of negligence to impose liability upon a railroad under the Federal Employers' Liability Act. There was no evidence of negligence in the present case. This Court has reached the same conclusion in the only factually similar cases presented to it.

In *Herdman v. Pennsylvania R. R.*, 352 U. S. 518 (1957), an employee sued the Railroad under the Federal Employers' Liability Act after he was injured because the train in which he was working made an emergency stop to avoid hitting an automobile at a public crossing. This Court affirmed a directed verdict for the Railroad.

The issue was again before this Court in *New York, New Haven & Hartford R. R. v. Henagan*, 364 U. S. 441 (1960), reversing 272 F. 2d 153 (1st Cir. 1959). In that case an engineman unsuccessfully attempted to stop a train to avoid hitting a woman who stepped onto the railroad tracks at a station. An employee on the train was hurt by the emergency stop and sued the railroad under the Federal Employers' Liability Act. This Court reversed a judgment for the plaintiff.

In *Woodington v. Pennsylvania R. R.*, 236 F. 2d 760 (2d Cir. 1956), cert. denied sub nom. *S. J. Groves & Sons Co. v. Pennsylvania R. R.*, 352 U. S. 970 (1957), an engineman (working as a fireman) brought an F. E. L. A. action for injuries he received when the train on which he was working collided with a crane stalled on the Railroad tracks at a public crossing. The Court of Appeals for the Second Circuit reversed a judgment against the railroad, holding that

it was error for the trial court to have permitted the jury to "find some duty on the part of the engineman to be able to stop the train at any point along the track within the range of its operator's vision in order to avoid the danger of stalled objects lodged on the right of way" (236 F. 2d at 766). This Court denied a petition for a writ of certiorari.

None of the cases cited in the petition is at all inconsistent with the present decision of the Pennsylvania Supreme Court and none is even factually similar.[7]

CONCLUSION.

Hoover's and Phoenix's witnesses established the facts which showed that Phoenix was negligent and the Railroad was not. The decision is not in conflict with any case decided by this or any other court, and does not involve any new application to suits under the Federal Employers' Liability Act. The petition seeks merely to relieve Phoenix from the burden of paying the full amount of the judgment obtained against it for its admitted negligence, in a claim not related to any federal right or obligation, and entered

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[7] **Schultz v. Pennsylvania R. R.**, 350 U. S. 523 (1956), was a Jones Act case where the decedent was required to work on a dark, icy and underpowered boat. In **Rogers v. Missouri Pacific R. R. Co.**, 352 U. S. 500 (1957), an F. E. L. A. plaintiff had fallen from a culvert while working on a railroad section gang. **Webb v. Illinois Central R. Co.**, 352 U. S. 512 (1957), involved a railroad brakeman who slipped on a clinker in the roadbed. In **Harris v. Pennsylvania R. R.**, 361 U. S. 15 (1959), a railroad employee fell on a tie that provided insecure footing because of grease or oil. **Inman v. Baltimore & Ohio R. Co.**, 361 U. S. 138 (1959), held that there was insufficient evidence to justify a finding of negligence where a railroad watchman was struck by an automobile at a crossing. **Davis v. Virginian Railway Co.**, 361 U. S. 354 (1960), involved a claim of a yard conductor injured while working on top of a car with inexperienced help plus a malpractice claim against the railroad's doctor.

in favor of a plaintiff who took no part in the appeal below and who will be unaffected by any action taken in response to this petition. It is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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